



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No.: JR855/2012

In the matter between:

DOCTORS DIETRICH VOIGT MIA

Applicant

Trading as PATHCARE

and

COMMISSIONER PRAKASH ROOPA

First Respondent

N.O.

**THE COMMISSION FOR
CONCILIATION, MEDIATION AND
ARBITRATION**

Second Respondent

NEHAWU on behalf of ELIAS

Third Respondent

MZINGO TSAWE

Heard: 30 June 2015

Delivered: 25 January 2016

Summary: Review application. Employee charged with Sexual harassment. Commissioner finding that precise events stated in charge not proved in evidence and finding dismissal unfair. Commissioner failing to take into account the pattern of conduct of the employee and the totality of the evidence. Commissioner failing to consider the provisions of section 193(2)(b) of the Labour Relation Act 66 of 1995 and assess, in light of the employee's conduct, whether a continued employment relationship would be intolerable. Continued employment clearly intolerable. Decision of commissioner not within band of decisions a reasonable commissioner would have reached. Test on review restated. Commissioner's award reviewed and set aside.

JUDGMENT

SNIDER AJ

- [1] This is an application in terms of which the applicant seeks the review of an award made by the first respondent ("the Commissioner") under NWKD2490-11 dated 2 March 2012 in which the commissioner, acting under the auspices of the second respondent, found that the dismissal of the third respondent ("the employee") was unfair. The Commissioner ordered the applicant to reinstate the employee and, further, awarded the employee compensation in the amount of R36,800-00 (thirty-six thousand, eight hundred rand) being the equivalent to eight months of his

remuneration at the time of his dismissal.¹

Background

- [2] Briefly, the background to this matter is as follows.
- [3] The applicant is a pathology laboratory business and the employee was employed, *inter alia*, to collect specimens from various doctors' surgeries and deliver results to them.
- [4] For the purposes of this matter, the employee collected specimens from the surgery of one Dr van Niekerk.
- [5] The matter is concerned with approaches that were made by the employee to one Wilhelmina Thlakane ("Thlakane") who appears to have been a general employee at Dr van Niekerk's practice.
- [6] An incident took place on 14 July 2011 between the employee and Thlakane. Thlakane's evidence was to the effect that the employee looked at her in a suggestive manner, approached her very closely, to the extent that she had to use a file to protect herself from him, that he suggested that they should go to the toilet together and, ultimately, when she rejected his advances, he left.
- [7] She was traumatised by these events and reported what had transpired to one Celeste van Zyl ("van Zyl").
- [8] Van Zyl then telephoned the applicant. The applicant duly instituted disciplinary proceedings against the employee. The charge against the employee was, verbatim -

'Sexual Harassment:

¹ A copy of the award appears at page 23 of the amended pleadings bundle

On 14 July 2011 you visited Doctor van Niekerk room to collect specimens and deliver reports. It is alleged that during your visit, you touched the clerk in an inappropriate manner in that you touched her breasts and other parts of her body. You were allegedly confronted by the senior of the same doctors rooms on a previous occasion for having done the same thing and was warned not to do it again or you will be reported'. ²

- [9] I will deal in greater detail with the evidence in the matter below.
- [10] The disciplinary enquiry duly took place on 2 August 2011 and the employee was dismissed pursuant to that disciplinary enquiry. An appeal hearing was conducted on 18 August 2011. The appeal hearing appears to have been abandoned³ at the behest of the employee relating to his desire to be represented by a party external to the applicant.
- [11] The applicant then referred the matter to the second respondent and the hearing was conducted before the Commissioner on 21 February 2012.

Grounds for review

- [12] The applicant's first ground of review relates to the manner in which the Commissioner conducted himself during the course of the arbitration.
- [13] Whilst it is unnecessary to deal with each and every instance of the Commissioner's conduct which the applicant complains of, I am of the view that the Commissioner's conduct was entirely unacceptable and the transcript of the proceedings is replete with incidents where he clearly descended into the arena to the extent that it created significant difficulties for both parties in running the arbitration.
- [14] However, although the Commissioner's conduct was unacceptable I need to consider the degree to which it impacted on a full conspectus of the evidence being led at the arbitration and its consequent impact on the

² The notice to attend a disciplinary hearing appears on page 144 of the first volume of the record.

Commissioner's ability to come to a conclusion in the matter and, obviously, its impact on this review application.

- [15] I do not think that the Commissioner's conduct, as improper as it was, entirely vitiated the proceedings before him and his consequent award.
- [16] This finding must not in any way be seen to condone the conduct of the Commissioner.
- [17] The second ground of review is that the Commissioner failed to take cognisance of a pattern of behaviour on the part of the employee where evidence was given of conduct similar to that which the employee was accused of in respect of the events of 14 July 2011.
- [18] The third ground of review is that the Commissioner's conduct itself caused Thlakane to become confused in relation to her testimony.
- [19] Thlakane, it appears, gave evidence at the disciplinary enquiry that she was in fact touched by the employee during the course of the incident on 14 July 2011 but, at the arbitration, gave evidence that she was not touched. The failure on Thlakane's part to give evidence at the arbitration that she was touched is, in effect, the basis on which the Commissioner found that the employee's dismissal was unfair and this ignores not only the pattern of conduct in respect of which there was evidence against Thlakane but also the corroborating evidence of van Zyl.
- [20] The third ground of review is that the Commissioner, on an unwarranted basis, narrowed the issues before the arbitration, which included the incident where the employee suggested that he and Thlakane "go to the toilet".
- [21] A further ground of review relates to the relief afforded to the individual third respondent particularly relating to his reinstatement.

[22] The Commissioner failed to advance any proper reasoning or motivation in respect of why he reinstated the employee. I must mention at this stage that the Commissioner did state that the applicant had not demonstrated that the trust relationship between the applicant and the employee had broken down. In my view the breakdown was amply demonstrated by the evidence of John Pepper, an area manager for the applicant, and the evidence as a whole.

[23] Although the submission of “*brief arguments*” is referred to by the Commissioner in his award,⁴ same do not form part of the record.

[24] I am accordingly not able to determine what was submitted to the Commissioner in argument.

Consideration of the grounds of review

[25] The Commissioner took an extremely narrow view of the charge with which the employee was charged and then made an extremely narrow finding in relation thereto. It must be noted that although a specific event and specific particularised conduct is referred to in the charge, the part of the charge which is underlined and in bold is the phrase “*sexual harassment*”. The part of the charge which the Commissioner takes issue with is “*you touched the clerk in an inappropriate manner in that you touched her breasts and other parts of her body*”. An employer is in any event entitled to frame a charge sufficiently widely to encompass a lesser involvement. The underlined rubric “*sexual harassment*” speaks to this being the case here.⁵

[26] The Commissioner’s finding in this regard is as follows⁶ –

‘ 22. Secondly what it is tasked to do, is to prove (the applicant) the specific charge for which it dismissed him. In that regard it had failed

⁴ Amended pleadings bundle page 76 paragraph 14

⁵ *Chemical Workers Industrial Union and Another v Algorax (Pty) Ltd* (1995) 16 ILJ 933 (IC) at 940A.

⁶ Page 29 of the pleadings.

to do so. The charge against Tsawe was very specific of his conduct on the 14th July 2011. That he 'touched her breasts and other parts of her body'. There is no evidence to that effect: as the alleged victim, Thlakane, twice indicated he did not touch her at all. That fact is fatal to the case of the respondent, as it is called upon to prove the charge it preferred against Tsawe which is not supported by the facts as were presented to me.

23. Finally, it must also be mentioned that Tsawe was not charged for sexual harassing Thlakane for suggesting she join him in toilet, which is largely relied upon, but for which it did not refer to at all in the charge sheet.
24. I therefore cannot find that the respondent has proven the charge against Tsawe on a balance of probability, which renders his dismissal as unfair.
25. I also take into account Tsawe's plea that he be allowed to return to work'.

[27] Not only do the Commissioner's findings in this regard stem from an unacceptably narrow interpretation of the charge, but the finding also entirely disregard a full conspectus of the evidence against the employee and demonstrates a woeful failure, on the part of the commissioner, to consider the provisions of section 193(2)(b) of the Labour Relations Act⁷ ("the LRA"). Had the Commissioner taken into account the evidence of both Thlakane and van Zyl that this was not the first instance of sexual harassment against the employee and that on 14 July 2011 –

- 27.1. he had approached close to her;
- 27.2. she had to protect herself with a file;
- 27.3. she had to push him with the file;

⁷ Act 66 of 1995 (as amended)

27.4. he said to her that “we better go inside the toilet”; and

27.5. she said to him that she is “not like other woman” and “not easy”;⁸

he would undoubtedly have come to a different conclusion.

[28] Thlakane also expressed her fear to van Zyl and expressed that “she had to stop this before it goes too far”.

[29] Ironically, when the applicant's representative is questioning Thlakane on the issue of being asked to go to the toilet as to what her interpretation of that request was, the commissioner states “*ag it is obvious madam*”.⁹

[30] Thlakane approached van Zyl and she was clearly traumatised by the incident.¹⁰

[31] Thlakane also gave evidence of an incident that took place at a pawn shop at a place called Tolbos where the employee made various unwarranted suggestions relating to a potential relationship between him and Thlakane and also accused her of prostitute like behaviour. Thlakane further gave evidence that the conduct of the nature perpetrated by the employee on 14 July 2011 had happened before.¹¹

[32] Van Zyl gives clear corroborating evidence of the events of 14 July 2011 as well as of the fact that this was the second time that events of this nature had occurred.¹²

[33] Van Zyl gives evidence specifically in relation to Thlakane using the file to protect herself and, effectively, preventing the employee from touching her

⁸ Page 76 to 81 of the transcript which forms part of volume one of the record.

⁹ Page 83 lines 25 record volume one

¹⁰ Page 85 of record volume one

¹¹ Page 93 of record volume one

¹² Page 105 of record volume one lines 13 to 27 and page 106

breasts.¹³

- [34] It my view it matters not, in considering the matter relative to the provisions of section 193(2) (b) of the LRA, that is to say whether the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; whether the specific and particular conduct with which the employee was charged was in fact perpetrated by the employee.
- [35] The facts, and they are largely undisputed bearing in mind that no proper version was put to Thlakane in cross-examination, show a pattern of conduct that amounts to persistent sexual harassment of a demeaning, insulting and injurious type.
- [36] Having conducted himself in this matter the employee could not have expected to be reinstated and the Commissioner could not conceivably come to a reasonable conclusion that he should be reinstated.
- [37] The test on review is now notoriously well known in our law and is set out in *Sidumo and Another v Rustenburg Platinum Mine Limited and Others*¹⁴ and has recently been revisited in *Herholdt v Nedbank Limited (Congress of South African Trade Unions and Amicus Curie)*¹⁵ and *Goldfields Mining (Pty) Ltd (Kloof Gold Mine) v Commissioner for Conciliation Mediation and Arbitration*.¹⁶
- [38] The following is an exposition of the test from the judgment of Waglay, JP in the *Kloof* decisions *supra*.¹⁷

'*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation,

¹³ Page 106 line 10 to 15 of the record volume one

¹⁴ [2007] 12 BLLR 1097 CC;

¹⁵ (2013) 34vILJ 2795 (SCA)

¹⁶ 2014 35 ILJ 943 (LCA) at paragraph [14]

¹⁷ At paragraph [14]

determination of the reasonableness of the decision arrived at by the arbitrator. The court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act ("the LRA") continued to be determined in terms of section 145 of the LRA but that the constitutional standard of reasonableness is "suffused" in the application of section 145 of the LRA. This implies that the application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to setting aside of the award if any of the above grounds are found to be present. In other words, in the case such as the present where a gross irregularity in the proceedings is alleged, enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision maker could come on the available material.'

- [39] In my view the decision made by the Commissioner in this case relating to reinstatement of the employee is not one that falls in a band of decisions to which a reasonable decision maker could come on the available material.
- [40] The employee's conduct was simply beyond the pale and the employer could not be expected to reinstate him. It simply would have been intolerable to continue to have him as an employee under the circumstances.
- [41] In light of what has been set out above, although the applicant did not prove certain of the particularity of the charge against the employee, *in casu*, this ought not to have led to the reinstatement of the employee.
- [42] Similarly I am of the view that the decision to compensate the employee in the circumstances is not one that falls within the band of reasonable decisions to which the Commissioner could have come.
- [43] I do not believe that it would serve any purpose to remit this matter back to the first respondent for a fresh hearing. There is sufficient evidence

available to me to determine the dispute in an appropriate manner as referred to in section 145(4) (a) of the LRA.

[44] Accordingly, I make the following order:

44.1. The award is reviewed and set aside.

44.2. There is no order as to costs.

Snider, A J

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Anita Bosch of Snyman Attorneys

For the Third Respondent: Lebogang Galane of National Education Health and Allied Workers Union